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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-675

ALTON R. BROWN, JR.,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
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ALTON R. BROWN, JR.,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Alton R. Brown, Jr., prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit, affirming a decree and judgment rendered by the United States District Court for the Southern District of Alabama in Respondent's favor.

I.

OPINIONS BELOW

A. This is a petition to the United States Court of Appeals for the Fifth Circuit and specifically to its

opinion dated July 20, 1972. This opinion has not yet been reported and is set out in full in Appendix A hereto.

B. The case was tried to a jury in the United States District Court and an opinion was not rendered by said Court. The judgment rendered by the District Court is set out in Appendix B hereto.

II.

JURISDICTION

A. The judgment of the Court of Appeals was made and entered on July 20, 1972. Petitioner timely filed in the Court of Appeals a petition for rehearing *en banc* and said petition was denied on September 5, 1972; a copy of said order is appended as Appendix C.

B. Petitioner filed an application to stay the issuance of the mandate on September 11, 1972, and a stay of the mandate was granted to October 19, 1972. Application has been made to extend the stay of the mandate until October 30, 1972.

C. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

III.

QUESTIONS PRESENTED

This case resulted in the imposition of the 100 percent penalty tax assessment prescribed by Section 6672 of the Internal Revenue Code of 1954, 26 U.S.C. 6672,

on the Petitioner in his capacity as named president of his client's corporation. In its instructions to the jury, the trial court completely ignored the law of the State of Alabama relative to the powers and duties of corporate officers and further omitted other significant legal principles to the detriment and prejudice of the Petitioner. The Court of Appeals declined to disturb the verdict of the jury and the judgment of the trial court entered thereon.

The questions for review on this petition are:

1. In the absence of statutory definition under Section 6671, Title 26 U.S.C., relative to the powers and duties of corporate officers, may the Federal Court ignore state law and implement its own standards as to the corporate individuals who will be held responsible under the Act?

2. Whether Sections 6671 and 6672, Title 26 U.S.C., should be construed to apply to an attorney who is rendering a professional service to his client and who in fact neither possessed nor exercised any control over the corporate client?

3. Whether a jury verdict which is manifestly unjust and contrary to law and the evidence of the case must be permitted to stand to the detriment of the offended party?

4. Where the oral instructions of the trial court to the jury are prejudicial and contrary to law and exceptions to such instructions are not taken by the offended party, is the appellate court foreclosed from correcting

such error in view of Rule 51, Federal Rules of Civil Procedure?

IV.

STATUTES INVOLVED

The statutes involved are 26 U.S.C. § 6671(b) and 26 U.S.C. § 6672, Internal Revenue Code of 1954. These statutes read as follows:

§ 6671(b):

> "Person defined. ... The term 'person', as used in this subchapter, includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."

§ 6672:

> "Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under Section 6653 for any offense to which this section is applicable."

V.

STATEMENT OF THE CASE

Petitioner, Alton R. Brown, Jr., attorney and as president of Gulf Sewing Industries, Inc., a corporation, was assessed by the Commissioner of Internal Revenue with the 100% penalty tax under Section 6672 of the Internal Revenue Code of 1954 for FICA and withholding taxes due from said Gulf Sewing Industries, Inc., an Alabama corporation. In the trial court, Petitioner contended that he was not responsible for collecting and remitting the taxes in that he was in no way engaged in nor did he have authority over the operations of the corporation and at no time did he exercise any such authority or control. Petitioner paid the sum of $50 toward the alleged penalty and filed a claim for refund, which claim had been denied by the Respondent, United States of America. By its answer and counterclaim, the Respondent alleged assessments against Petitioner in the total sum of $23,987.97 for the Petitioner's alleged willful failure to account for and pay over the withholding and FICA taxes owing by Gulf Sewing Industries, Inc. for the third quarter of 1967. Issue was joined in the trial court on the question of whether the Petitioner was a person responsible for withholding, truthfully account for and paying over FICA and withholding taxes, and if so, whether his failure to so withhold, truthfully account for and pay over such taxes was willful.

The Petitioner is an attorney and was contacted by S. O. Bogash and Rosalie Bogash, husband and wife, in July of 1965 relative to their personal financial dif-

ficulties and the attachment by the Internal Revenue Service of their salaries, home, furniture and automobiles for unpaid FICA and withholding taxes occurred in the State of Maryland. Thus, an attorney-client relationship was created and existed between the Petitioner and the Bogashes.

S. O. Bogash was one of the original incorporators of Gulf Sewing Industries, Inc., a small corporation located in Citronelle, Alabama (some 30 miles north of Mobile); his wife worked for him in the corporation's garment manufacturing plant. The business was commenced in 1964, and an individual, Mr. Clay Bassett, furnished the financing for the business (over $100,000.00); Mr. Bogash's contribution to the business was his extensive experience in the garment manufacturing business. Mr. Bogash had complete and absolute control over the business and made all decisions concerning its operation. Bassett signed or counter-signed payroll checks of the corporation. Bassett was president of the corporation; Bogash was vice-president; and Mrs. Bogash was secretary.

Petitioner initially represented the Bogashes in their negotiations with the Internal Revenue Service and spent a good deal of time on their behalf for which he was not paid; during this period of time, Petitioner was in no way involved with Gulf Sewing Industries, Inc. Finally, Mr. Bassett advised Mr. Bogash he wanted to get out of the corporation as it was not making any money and the stock was worthless. Mr. Bogash requested Petitioner to take Mr. Bassett's stock which Petitioner did so in the summer of 1965, for the total

consideration of $1.00. Petitioner at the request of Mr. Bogash, became president of the corporation[1], but Mr. Bogash retained complete control over the business and continued to make all of the decisions for the business. Petitioner did, at the request of Mr. Bogash, sign payroll checks for the corporation and eventually permitted a stamp bearing a facsimile of his signature to be used on the payroll checks. Subsequently, Mr. Bogash put Petitioner on the corporation's payroll in order to repay him for legal services rendered by Petitioner to the Bogashes. It is significant to note that the evidence was uncontradicted that at no time did Petitioner exercise any control over the corporation and did not participate, nor did he have authority to participate, in any decisions relative to the operation of the corporation. Petitioner visited the corporate plant on two occasions which were completely unrelated to business.

In the fall of 1965, a representative of the Internal Revenue Service in Mobile, Alabama contacted the Petitioner and advised him that Gulf Sewing Industries, Inc. had fallen behind on a quarterly payment of FICA and withholding taxes. The Petitioner immediately called Mr. Bogash and advised him that the corporation's taxes should be paid, and Mr. Bogash brought the payments current.

Although the corporation had experienced fairly good results in 1966, it was broke by the summer of 1967, and Mr. Bogash made arrangments with another

---

[1]Petitioner was never elected president of the corporation; his name simply began appearing as president in place of Bassett.

corporation, Satellite Outerwear Corporation, for financing of Gulf Sewing Industries, Inc. On or about August 2, 1967, Satellite sent a representative to the Citronelle plant of Gulf Sewing, and this representative countersigned all checks of Gulf Sewing rather than the Petitioner. The Petitioner endorsed the stock certificate of Gulf Sewing in blank and gave it, together with the stock power and Petitioner's letter of resignation as president, to Satellite's attorney who kept possession of the same. Petitioner at no time became involved in the operation of the business and was advised by Bogash that the corporation was on a sound financial basis.

On September 14, 1967, Mr. Bogash committed suicide, and Petitioner learned that the corporation was in deep financial trouble. Petitioner then learned through the Mobile Collector of Internal Revenue Service that taxes withheld from employees of Gulf Sewing for the third quarter of 1967 (ending on September 30, 1967) had not been paid. At the insistence of the IRS representative, and because there was no one else available to sign, the Petitioner signed the corporate return for the period in question, which return had been prepared by the said IRS representative.

After August 2, 1969, the Petitioner had assigned the stock of Gulf Sewing and did not know who owned the stock. The Petitioner had taken the stock at the request of his client, Mr. Bogash, and his participation in the corporation was nothing more than an attorney assisting his client at his client's request. Although repetitious, it is significant to reemphasize that Petitioner never controlled, nor was he authorized to control,

the business operations of Gulf Sewing Industries, Inc.; all of the decisions relative to the operation of the corporation were made by Mr. Bogash and, after August 2, 1967, Satellite.

On the basis of the foregoing evidence, the trial court instructed the jury that the duties of a president of a corporation are as follows:

> "The evidence is undisputed that he, at least in title, he was president of the corporation. Now, absent some special provision in the by-laws or charter of the corporation, the presumption is that the president is the chief executive officer of a corporation, and as such, in this area, is responsible generally for operation of others underneath him including the vice president, secretary-treasurer and the ultimate decision on a day to day basis subject to correction by the Board of Directors."

This instruction is contrary to the law of Alabama.

Further, the trial court instructed the jury that:

> "There is no requirement that a president of a company be involved with a day to day responsibility of who is going to be paid and who isn't. Typically, jobs and responsibilities are delegated by one person to another. And, in general, if there is no reason to believe other than the person you delegate the responsibility to would do a proper job, that would be or

could be held to be an excuse that prevents the man that might be charged with having willfully done something. Because if he turned over or delegated a job and had no reason to believe that that job wasn't going to be carried out, then it would be difficult to say that he willfully failed to do the thing down the line. But if you turn over a job or delegate the responsibility to someone that you know or should know ought not to be trusted with this particularly kind of job, and if you do that delegation, knowingly and intentionally, and consciously, then you ought to be held and expect the outcome if that person to whom you delegated the job failed to live up to the responsibilities. So, in that sense where someone delegates a job to somebody that he ought to know could not be trusted in the matter, in that particular matter, he can't later come in and say, well, I didn't act willfully because I just assumed the other person would, in effect, change his way of life is what it amounts to. So, in this particular case, in weighing the question of whether there was any willfullness, you would look to see whether or not there was a delegation of power, responsibility or a sharing of responsibility over where money would go, and over who would get paid, with people that ought not to have been entrusted with that kind of responsibility, because of some past record that they had had. If you find that Mr. Brown willfully under the test I have given you made such a delegation of authority, allowed

> that to take place when he had the power to have prevented it, and that person should not have been trusted with that, and they were responsible, then this would make his act willful in allowing them to continue in that area."

In substance, the Court told the jury to find willfullness on the part of the Petitioner simply because Mr. Bogash had previously been found liable for a 100% penalty in Maryland and did have control over the payment of the funds prior to his death.

The Respondent did not offer into evidence the "certificate of assessment and payments, Form 899."

On the basis of the trial court's oral charge and the evidence, the jury found the Petitioner was a person responsible for withholding, truthfully accounting for and paying over FICA and withholding taxes and that Petitioner had willfully failed to pay over to the Government the taxes withheld from employees of Gulf Sewing Industries, Inc. during the third quarter of 1967. Timely motion for a judgment in favor of the Petitioner notwithstanding the verdict was denied by the trial court.

On appeal, the Fifth Circuit in a brief opinion affirmed and simply found there was sufficient evidence to support the jury's verdict. The Fifth Circuit declined to consider the instructions of the trial court to the jury because exception was not raised thereto before the jury retired to consider its verdict.

VI.

REASONS FOR GRANTING THE WRIT

The instructions of the trial court to the jury, and the refusal of the Fifth Circuit Court of Appeals to reverse, were contrary to the laws of the State of Alabama relative to the duties and powers of corporate officers and were highly prejudicial to the Petitioner. The opinion of the Fifth Circuit Court of Appeals completely ignores the legal principles applicable to the case and is in direct conflict with its own opinion in a similar case.

1. The trial court instructed the jury that:

> "The evidence is undisputed that he [Petitioner], at least in title, he was president of the corporation. Now, absent some special provision in the bylaws or charter of the corporation, the presumption is that the president is the chief executive officer of a corporation, and as such, in this area, is responsible generally for operations of others underneath him including the vice-president, secretary-treasurer and the ultimate decision on a day to day basis subject to correction by the Board of Directors."

Such instruction is directly in conflict with the law of the State of Alabama and, in effect, substitutes a federal standard with respect to the duties of a corporate president in an area where state law unquestionably governs. § 6671(b) of Title 26 U.S.C. does not

attempt to define the duties of corporate officers; that section defines "person" as "... an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs." In the absence of any statutory definition of the duties of a corporate officer § 6671(b), it is submitted the federal court should look to the state law for such definition, and where the state courts have spoken on the subject, the state law should control.

As to the powers of the President of an Alabama corporation, the Supreme Court of Alabama in *McMillan vs. Dozier*, (1952) 257 Ala. 435, 441, 59 So.2d 563, said:

> "A president of a corporation has no greater power by virtue of his office merely than any other director of the company, except that he is presiding officer of the meetings of the Board. The implied power of the presiding officer of the corporation is dependent upon the nature of the company's business and the measure of 'liability' delegated to him by the Board of Directors. *Sampson v. Fox*, 109 Ala. 662, 19 So. 896; *Clark v. Minge*, 187 Ala. 97, 65 So. 832.

In *Clark vs. Minge*, 1914, 187 Ala. 97, 101, 65 So. 832, the Alabama Supreme Court held:

> "The treasurer of a corporation is the party to whom is committed the custody of its funds.

> While other officers or agents may have the power to collect money due the corporation, and may also have the power to retain the custody of and pay out such funds, *no such power impliedly belongs to a president of a corporation simply because he is president.* The implied duty of the treasurer is, however, to receive and guard the funds of the corporation, and he is the party who possesses the implied power to collect debts due the corporation, of which he is the treasurer. In re Millward-Cliff Cracker Company's estate, 161 Pac. 157, 28 Atl. 1072." (Emphasis added.)

To the same effect is the case of *Sampson vs. Fox*, (1896) 109 Ala. 662, 671, 10 So. 896.

There was not a scintilla of evidence at the trial below that the Petitioner, by virtue of his office in the corporation, had been given any power to expend the corporate funds of Gulf Sewing Industries, Inc. On the contrary, the evidence conclusively showed that Petitioner was not given, nor did he exercise, any powers relative to the operation and control of the corporation. Perhaps the following testimony of Mrs. Bogash relative to who controlled the corporation's functions best illustrates this fact:

> "Q. When a major decision had to be made such as who to pay, did Mr. Bogash ever contact Mr. Brown?
>
> A. No, definitely not. Either Mrs. Turner or I prepared a list of outstanding debts each

week. And we gave it to him, and he checked off the ones that he wanted — for whom he wanted the checks drawn.

Q. Now, that would be Mr. Bogash who did that?

A. Absolutely." (R. 156-157.)

The effects of the trial court's charge to the jury was to ignore the state law applicable to the case and to instruct the jury that by virtue of his being president, the Petitioner was responsible "to collect, truthfully account for, and pay over" any taxes due. This was in direct conflict with the law of Alabama defining the duties of a corporate officer, and clearly was contrary to the evidence as to Petitioner's powers in the corporation.

The Fifth Circuit held that:

"Thus, although Brown may have lacked *the direct personal duty* to collect, account for, and pay over the taxes, the jury might well have *inferred* that he had effective power and corresponding duty to insure that the corporate obligation to the Government would be fulfilled. Were we to hold to the contrary — that lack of individual authority to sign corporate checks insulated Brown from liability — we would surely open the door to protective cosigning arrangements. The effect of such a holding would tend to emasculate section 6672." (Opinion, p. 3.)

This holding of the Appellate Court recognizes the insufficiency of the evidence to show Petitioner did in fact have the powers and duties to fulfill the obligations of § 6672, but establishes a federal standard to the effect that only an "inference" be established in order to cast an individual in liability for the 100% penalty tax assessment. It is submitted that such standard transcends the intent of the statute (26 U.S.C. 6672) and is contrary to the applicable state law. In *Commissioner vs. Bosch*, 1967, 387 U.S. 456, Mr. Justice Douglas said in dissent:

> "Not giving effect to a state court determination may be unfair to the taxpayer and is contrary to the congressional purpose of making federal tax consequences depend upon rights under state law."

2. The evidence presented at the trial court conclusively established that Petitioner was an attorney rendering a professional service to his clients in permitting the use of his name in the corporation. It was undisputed that Petitioner paid nothing for the corporate stock and received nothing for it when he endorsed it in blank in August of 1967; he never was elected president of the corporation but was more or less designated as such by his client. Clearly, all of his activities relative to the corporation were done as assistance to his clients [the Bogashes]. However, the trial court, approved by the appellate court, permitted judgment against Petitioner as a "person required to collect, truthfully account for, and pay over" FICA and withholding taxes due from Petitioner's clients' corporation. It is submitted such conclusion was

not intended by the statute, and this Court should not permit such judgment to stand.

3. During the trial court's oral charge to the jury, the jury was further instructed in substance that (a) the Petitioner, as sole stockholder could have eliminated Petitioner's clients [the Bogashes] as directors and officers of the corporation;[2] (b) that the corporate creditors had no control over the corporation so as to relieve the Petitioner of his "responsibilities" under § 6672;[3] (c) that willfullness within the meaning of

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[2]At page 82 of the Appendix, the trial court instructed the jury:

> "Now, if he held that stock in a way such as to give him the normal rights that go with stock ownership, he would then by virtue of that ownership of the stock have power to elect the directors, all directors of the corporation, including the power not to elect for example the Bogashes."

Further, the trial judge stated:

> "Because if he had the normal, what we normally say ownership means when you have stock, he would have had the power to elect directors of his own choice and to eliminate the Bogashes."

[3]At page 86 of the Appendix, the trial court said:

> "You can't contract away the obligations that go with corporate ownership and management, to creditors of the corporation, and by doing so then come in and say, well, we have no longer any control over it, we gave that up. Ownership of property, management of a business, acting as an employer, carries not only privileges, but responsibilities. And some of these cannot be given away to others, or at least if you do, you still remain liable for what happens. And in this case it will be up to you to determine whether or not restrictions that may have been placed on disbursement of funds by some creditors, in effect, contributed in some way in the problem to pay. And it would not be an excuse that those other actions did contribute, if there was any way and any possible or action that the plaintiff in this case, Mr. Brown, could have taken to have prevented that kind of delegation of authority."

the statute could be found against the Petitioner simply because Petitioner had knowledge of Mr. Bogash's previous liability for 100% penalty assessment while operating a previous business in Maryland.[4] These instructions were erroneous and manifestly prejudicial to the Petitioner. The Court below declined to even review the trial court's oral instructions and stated that the Petitioner was precluded from attacking the trial court's oral charge under Rule 51 F.R.C.P. because of Petitioner's failure to object to the oral charge. While it is submitted this ruling in and of itself was erroneous and will be discussed in more detail under point 4 hereinafter, it is submitted that the trial court's charge to the jury under the evidence was so prejudicial to Petitioner as to require reversal and a new trial.

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[4]On pages 84-85 of the appendix, the trial judge instructed the jury:

> "But if you turn over a job or delegate the responsibility to someone that you know or should know ought not to be trusted with this particularly kind of job, and if you do that delegation, knowingly and intentionally, and consciously, then you ought to be held and expect the outcome if that person to whom you delegated the job failed to live up to the responsibilities. So, in that sense where someone delegates a job to somebody that he ought to know could not be trusted in the matter, in that particular matter, he can't later come in and say, well, I didn't act willfully because I just assumed the other person would, in effect, change his way of life is what it amounts to. So, in this particular case, in weighing the question of whether there was any willfullness, you look to see whether or not there was a delegation of power, responsibility or a sharing of responsibility over where money would go, and over who would get paid, with people that ought not to have been entrusted with that kind of responsibility, because of some past record that they had had."

(a) The jury was told by the trial court that as a matter of law Petitioner as owner of the corporate stock could have eliminated his own clients, the Bogashes, as officers and directors of the corporation. Clearly, this instruction created an impression in the jury's mind that the Petitioner was a responsible person under the statute solely because he did not use his "power" as sole stockholder to eliminate his own clients as officers and directors of their own corporation. There is no authority, it is submitted, for such a legal proposition under 26 U.S.C. § 6672.

(b) The jury was further told by the trial court that Petitioner could not escape responsibility for the taxes because creditors of the corporation operated and controlled the functions of the corporation. Such instruction was clearly in conflict with the Fifth Circuit's decision of *McCullough vs. U.S.*, (5 Cir., 1972) 462 F.2d 588 decided on July 14, 1972 by another panel of that Court. The instruction further conflicts with the district court cases of *Builders Finance Company, Inc. vs. U.S.*, (E.D. Mich., 1970), 27 AFTR2d 71-538, and *Walker vs. U.S.*, (W.D. Okla., 1963), 21 AFTR2d 1398.

(c) Finally, the trial court instructed the jury they could find willfullness under the statute on the part of the Petitioner simply because the Petitioner had knowledge of his client's previous liability for 100% penalty tax assessment under the statute while operating another business in Maryland. The appellate court held "the jury was justified in *inferring* that Brown acted willfully." The charge was highly prejudicial to the Petitioner in that it made absolutely no reference

to whether Mr. Bogash failed to pay the taxes in question. In view of the fact Mr. Bogash died on September 14, 1967 and the taxes were due for the quarter ending September 30, 1967, it was completely impossible for Mr. Bogash to have had anything to do with the failure to pay the taxes for such quarter, and any reference to Mr. Bogash's previous non-payment of taxes was only prejudicial to the Petitioner. The trial court incorrectly charged the jury on the issue of willfullness, and the jury's finding in this respect was totally unsupported by the evidence. The appellate court erred in failing to correct this manifest error to the detriment of the Petitioner.

(d) The trial court further erred to reversal in placing the burden of proof on the Respondent's counterclaim upon the Petitioner. In the case *sub judice*, the Respondent did not offer into evidence the certification of the Commissioner's assessment in support of the counterclaim. Such evidence was germane to the Respondent's counterclaim, and the failure to offer the same was fatal to the Respondent's case. In *Psaty vs. U.S.*, (3 Cir., 1971) 442 F.2d 1154, the court said:

> "We hold therefore that when the Government offers in evidence the certification of the Commissioner's assessment in support of the counter-claim, the presumption of correctness operates to place upon the taxpayer both the burden of going forward and the burden of persuasion."

See also *U.S. vs. Molitor*, (9 Cir., 1964) 337 F.2d 917. Since the Respondent did not offer the said certificate

herein, it was error to place the burden of disproving the counterclaim on the Petitioner.

4. The appellate court held that the failure of the Petitioner to except to the trial court's oral charge to the jury foreclosed the appellate court from considering objections on appeal, absent plain and prejudicial error, under Rule 51 F.R.C.P. The court further concluded that any possible error was harmless. As previously noted and argued herein, the errors of the trial court were manifestly prejudicial to the Petition and the verdict of the jury in response to said charge was contrary to the law and evidence. It has been held that even in the absence of objection to the trial court's oral charge, the appellate court can, and should, consider grounds of error where it is apparent on the face of the record that a miscarriage of justice may occur. *Sandifer vs. Electrolux Corp.*, (4 Cir., 1949) 172 F.2d 548; *Dowell, Inc. vs. Jowers*, (5 Cir., 1948) 166 F.2d 214; *McNello vs. John B. Kelly, Inc.*, (3 Cir., 1960) 283 F.2d 96; *Wirtz vs. International Harvester Co.*, (5 Cir., 1964) 331 F.2d 462; *Moore's Federal Practice*, Vol. 5A, pp. 2507 et seq., par. 51.04.

It is respectfully submitted that this case presents precisely that degree of prejudice to a litigant wherein the appellate court would be justified, if not indeed obligated, to exercise its discretion to set aside a verdict premised on an erroneous charge of the trial court in order that a miscarriage of justice may not occur. Contrary to the conclusion of the appellate court below, the error of the trial court, as illustrated in this petition, was prejudicial and harmful to the Petitioner.

5. The decision of the court below involves an important question of tax law which affects the entire business community, as well as Petitioner. Any interpretations or construction of Title 26 U.S.C. § 6672, or definitions of persons responsible thereunder, should be fashioned by this Court, and the questions here presented should be settled for the guidance of lower courts and the parties whose rights are affected thereby.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted and that the decree of the Court of Appeals should be reversed

Respectfully submitted,

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PROOF OF SERVICE

I, W. Boyd Reeves, one of the attorneys for Alton R. Brown, Jr., Petitioner, hereby certify that on the ____ day of October, 1972, I served three copies of the foregoing Petition for a Writ of Certiorari, by mailing copies in duly addressed envelopes with first class postage prepaid to the following attorneys of record for the Respondent.

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APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2978

ALTON R. BROWN, JR.,
Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Alabama

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(July 20, 1972)

Before RIVES, BELL and MORGAN, Circuit Judges.

RIVES, Circuit Judge: Appellant Brown seeks to reverse the imposition upon him of the 100 per cent penalty tax assessment prescribed by section 6672 of the Internal Revenue Code of 1954, 26 U.S.C. 6672. That section provides that any person required to collect, truthfully account for, and pay over taxes to the Government who willfully fails to do so is liable to a penalty

equal to the total amount of the taxes not remitted. The preceding section, 6671, defines "person" as used in the subchapter to include "an officer * * * of a corporation * * * who as such officer * * * is under a duty to perform the act in respect of which the violation occurs."

Brown, an attorney, became the president of his client's corporation, Gulf Sewing Industries, Inc., and took an assignment of all the stock of the corporation from this client's financial supporter, who wanted to relinquish completely his role in the company's affairs. At trial the jury found (1) that Brown was a person responsible for payment of the withholding taxes to the Government, and (2) that he had willfully failed to remit the taxes due. Brown moved for a judgment notwithstanding the verdict, thus questioning the sufficiency of the evidence. The district court denied the motion. We affirm.

On review of the denial of Brown's motion for judgment n.o.v., our task is to review the evidence in the limited sense prescribed in *Boeing Co. v. Shipman*, 5 Cir. 1969, 411 F.2d 365.

On the issue whether he was a person responsible for withholding and paying over taxes, Brown stresses the evidence which indicates that he had only token managerial responsibility as president and that his cosignature on company checks was literally a rubber stamp. But other evidence provided the jury with an ample basis for believing that Brown had the "power and responsibility within the corporate structure for seeing that the taxes withheld from various sources

are remitted to the Government." *Monday v. United States*, 7 Cir. 1970, 421 F.2d 1210, 1214. Brown co-signed all corporate checks. He actively participated in efforts to secure additional financing for Gulf and made the decision to terminate Gulf's operations. Further, Brown was successful in securing payment of withholding taxes by Gulf during a prior quarter of his tenure as president, when payment of the taxes was late. Thus, although Brown may have lacked the direct personal duty to collect, account for, and pay over the taxes,[1] the jury might well have inferred that he had effective power and corresponding duty to insure that the corporate obligation to the Government would be fulfilled. Were we to hold to the contrary — that lack of individual authority to sign corporate checks insulated Brown from liability — we would surely open the door to protective co-signing arrangements. The effect of such a holding would tend to emasculate section 6672.

It is also clear that there was sufficient evidence to support the jury's finding that Brown willfully failed to remit the taxes due the Government for the period

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[1]In his brief, Brown argues that "for one to be a 'responsible person' within the meaning of [section] 6672, he must have the *final word* as to what checks are to be prepared, for whom, and in what amount" (emphasis in original), citing Hewitt v. United States, 5 Cir. 1967, 377 F.2d 921. Brown misunderstands the reach of our decision in *Hewitt*. There, we simply held that a taxpayer who *does* have "the final word" cannot escape liability as a responsible person by asserting that a corporate subordinate was responsible for paying bills and taxes. It by no means follows from our holding in *Hewitt* that a corporate officer or employee *must* have the final word if he is to be cast as a responsible person within the meaning of section 6672.

in question. Brown's close relationship with his client, Bogash, began when Bogash asked Brown to provide legal advice in connection with prior tax difficulties involving nonpayment of withholding taxes. Brown knew that withholding taxes had not been paid regularly at Bogash's previous Maryland business, and he also knew that the taxes had not been paid by Gulf during one quarter prior to his assuming of the presidency. Although Brown was aware of Bogash's past failure to pay withholding taxes, he continued to allow Bogash to sign checks without periodically inquiring as to whether withholding taxes were being paid to the Government when due. Under these circumstances, the jury was justified in inferring that Brown acted willfully. *United States v. Leuschner*, 9 Cir. 1965, 336 F.2d 246, 248.

Finally, in addition to questioning the sufficiency of the evidence, Brown now attacks the trial court's instructions setting forth the standards to be applied by the jury in determining whether he was a responsible officer of the defaulting corporation. However, Brown failed to object to the district court's instructions before the jury retired to consider its verdict. We are consequently foreclosed from considering the objections on appeal, Rule 51, F.R.Crim.P., absent plain and prejudicial error, Rule 52, F.R.Crim.P. The instructions given substantially approximated those requested by Brown. Any possible error was harmless. Rule 52, F.R.Crim.P.

AFFIRMED.

APPENDIX "B"

JUDGMENT

(Filed May 25, 1971)

[32] On this date into open court comes the plaintiff in his own proper person and by and through his attorney, the Honorable Hardy B. Smith, and the defendant by and through its attorney, the Honorable Fleming T. deGraffenried, and also comes the Petit Jury of twelve good and lawful persons, who were duly empaneled and sworn according to law on May 24, 1971, and the trial of the case is resumed.

Witnesses are sworn and examined on behalf of plaintiff, and exhibits offered on behalf of plaintiff and defendant. All parties rest.

Arguments by counsel are made, and the Court charges the Jury, and the Jury retires to consider its verdict.

Now comes the Jury, who having heard the evidence, the arguments of counsel and the Court's charge, returns the following Special Verdict:

"We, the jury, find as follows:

(1) Do you find that the plaintiff, Alton R. Brown, Jr., was a responsible person required to collect, truthfully account for, and pay over withholding and Federal Insurance Contribu-

tions Act, that is, social security, taxes for Gulf Sewing Industries, Inc. and that he willfully failed to collect. truthfully account for, and pay over such taxes to the United States, for the period ending September 30, 1967.

ANSWER: Yes ____
Yes No

This the 25 day of May 1971.

Stanley C. Stimpson
Foreman."

It is therefore ORDERED and ADJUDGED by the Court that a judgment be, and the same hereby is, entered in favor of the defendant, UNITED STATES OF AMERICA, and against the [33] plaintiff, ALTON R. BROWN, JR., and the plaintiff's claim against the United States of America in the original complaint is DENIED.

It is FURTHER ORDERED and ADJUDGED by the Court that a judgment be, and the same hereby is, entered on the Counterclaim of defendant against plaintiff, in favor of the defendant, UNITED STATES OF AMERICA and against the plaintiff, ALTON R. BROWN, JR., in the amount of TWENTY-THREE THOUSAND, NINE HUNDRED THIRTY-SEVEN and 97/100 ($23,937.97) DOLLARS, plus interest thereon as provided by law.

Costs of court are hereby taxed against the plaintiff.

Done at Mobile, Alabama this the 25th day of May, 1971.

/s/ Sam C. Pointer, Jr.
United States District Judge

APPENDIX "C"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2978

ALTON R. BROWN, JR.,
Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Alabama

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion July 20, 1972, 5 Cir., 1972, ____ F.2d ____).

(September 5, 1972)

Before RIVES, BELL and MORGAN, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-675

ALTON R. BROWN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court did not render an opinion. The opinion of the court of appeals (Pet. App. 1a–4a) is reported at 464 F. 2d 590.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1972 (Pet. App. 1a). On September 5, 1972, a petition for rehearing with suggestion of rehearing *en banc* was denied (Pet. App. 7a). The petition for a writ of certiorari was filed on November 1, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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er signing corporate papers until he finally decided to terminate the business (R. 73–75).

Because taxes withheld from Gulf's employees for the third calendar quarter of 1967 were not turned over to the government, assessments of $23,987.97 were made against petitioner as a responsible officer (R. 10). Petitioner paid a portion of the tax due and sued for a refund. The government counterclaimed for the remainder (Pet. 5).[3] The case was tried before a jury which, after instructions to which petitioner made no objection, found petitioner liable for the full amount of the assessment. The judgment entered on the jury verdict was affirmed by the court of appeals (Pet. App. 1a–4a).

ARGUMENT

1. Section 6672 of the Internal Revenue Code of 1954, 26 U.S.C. 6672, provides that any person who is required to withhold and pay over taxes and willfully fails to do so is liable for a penalty equal to the total amount of the taxes not paid over. Section 6671(b) of the Code defines "person" as including "an officer or employee of a corporation * * * who as such officer [or] employee * * * is under a duty to perform the act in respect of which the violation occurs." Responsible officer status does not depend on state law con-

[3] Petitioner suggests (Pet. 20–21) that the government was not entitled to prevail on its counterclaim because the assessments were not introduced in evidence. But the assessments were alleged in petitioner's own complaint (R. 5, 7) and admitted by the government in its answer (R. 9), thus making their introduction thereafter unnecessary.

cepts or on mechanical functions often associated with particular corporate offices. Rather it turns on whether the person, regardless of his title, possesses the authority over payment or nonpayment of taxes. *White* v. *United States*, 372 F. 2d 513, 516 (Ct. Cl.). There may be more than one responsible officer, and a showing that someone else was also responsible is not sufficient to defeat application of the statute. *Monday* v. *United States*, 421 F. 2d 1210 (C.A. 7). In general, those "high corporate officials charged with general control over corporate business affairs who participate in decisions concerning payment of creditors and disbursal of funds" are responsible officers under Section 6672. *Monday* v. *United States, supra*, 421 F. 2d at 1214–1215. See also *McCarty* v. *United States*, 437 F. 2d 961 (Ct. Cl.); *Newsome* v. *United States*, 431 F. 2d 742 (C.A. 5). To be responsible for payment over of withheld taxes a person need not have sole authority over expenditures; it is sufficient if he has only authority to prevent default on the payment of the taxes. *Datlof* v. *United States*, 252 F. Supp. 11, 33 (E.D. Pa.), affirmed, 370 F. 2d 655 (C.A. 3), certiorari denied, 387 U.S. 906. The factual determination as to whether one is responsible is, of course, within the jury's province. Here the evidence that petitioner was a necessary cosigner of checks, the sole stockholder, the president who received a salary, the signer of the withholding tax returns, a guarantor of Gulf's loans, and the person who made the final decision as to the termination of Gulf's operations, strongly sup-

ports the jury's verdict that he was responsible for paying over the withheld taxes.[4]

As to petitioner's contention that his conduct was not willful because he had delegated authority to the Bogashes, it is well settled that when a person who is responsible delegates his powers to one who he knows has failed properly to exercise such powers in the past, he has acted willfully. See, *e.g.*, *United States* v. *Leuschner*, 336 F. 2d 246 (C.A. 9).

2. Petitioner also claims error in the court's instructions to the jury. But those instructions essentially incorporated most of petitioner's requested instructions and properly reflected existing law. See, generally, *Monday* v. *United States, supra; McCarty* v. *United States, supra;* and *Newsome* v. *United States, supra.* Moreover, petitioner made no objection to the instructions at the time they were given; to the contrary, he informed the court he had no objection to them. Having failed to object in timely fashion, petitioner may not now complain of the instructions. Rule 51, Fed. R. Civ. P.

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[4] The fact that Satellite was required to countersign checks after August 1967 does not help petitioner here. There is no showing that petitioner, even though he was kept informed of Satellite's operation of Gulf, ever attempted to have the taxes paid or that Satellite ever refused to allow him to make the payments. See *Bloom* v. *United States*, 272 F. 2d 215 (C.A. 9), certiorari denied, 363 U.S. 803, where similar contentions did not relieve a responsible officer from liability.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
SCOTT P. CRAMPTON,
Assistant Attorney General.
THOMAS L. STAPLETON,
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DECEMBER 1972.

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DECEMBER 1972.

APPENDIX

The Internal Revenue Code of 1954 (26 U.S.C.) in pertinent part provides:

SEC. 3102. DEDUCTION OF TAX FROM WAGES.

(a) *Requirement.*—The tax imposed by section 3101 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid.

(b) *Indemnification of Employer.*—Every employer required so to deduct the tax shall be liable for the payment of such tax, and shall be indemnified against the claims and demands of any person for the amount of any such payment made by such employer.

SEC. 3402. INCOME TAX COLLECTED AT SOURCE.

(a) *Requirement of Withholding.*—Every employer making payment of wages shall deduct and withhold upon such wages (except as otherwise provided in this section) a tax determined in accordance with the following tables.

* * * * *

SEC. 6671. RULES FOR APPLICATION OF ASSESSABLE PENALTIES.

(a) *Penalty Assessed as Tax.*—The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary or his delegate, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter.

(b) *Person Defined.*—The term "person", as used in this subchapter, includes an officer or

employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

SEC. 6672. FAILURE TO COLLECT AND PAY OVER TAX, OR ATTEMPT TO EVADE OR DEFEAT TAX.

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under Section 6653 for any offense to which this section is applicable.

SEC. 7501. LIABILITY FOR TAXES WITHHELD OR COLLECTED.

(a) General Rule.—Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose.

* * * * *

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